KOW LUP PIOW & ORS

v.

LEE SOH HUA

HIGH COURT MALAYA, SEREMBAN
AJAIB SINGH J
[CIVIL SUIT NO. 115 OF 1977]
16 JUNE 1982

CONTRACT: *Specific performance - Certain conditions not specifically mentioned in agreement - Whether important - Repudiation of agreement - Oral variation of terms of agreement - Where admissible.*

EVIDENCE: *Oral - To vary the terms of written agreement - Whether admissible.*

By an agreement dated 22 September 1975, the defendant had agreed to sell her land to the plaintiffs for the price of RM700,000. They paid a total sum of RM300,000 as deposit and part payment of the purchase price and the balance of RM400,000 to be paid within one month after they being informed that the subdivisional titles have been issued. The defendant by a letter dated 7 September 1976 repudiated the said agreement alleging that no drainage plans were submitted to the Town Council for approval.

The plaintiffs thus sued the defendant for specific performance of the agreement and alternatively a refund of the RM300,000 which they had paid towards the purchase price. They also claimed a further sum of RM300,000 as liquidated damages and another sum of RM48,300 as special damages for the expenses incurred in levelling, filling the land and payment of various other fees.

The defendant on the other hand contended that the plaintiffs failed and or neglected to comply with the required conditions and therefore suffered damages. She counterclaimed a total sum of RM14,941.10 being payment for quit rent, assessment and survey fees.

Held:

[1] There was no undue delay on the part of the plaintiffs in trying to comply with the agreement. They had paid RM300,000 as part payment and were willing to pay the balance and they were doing the best to get the plans approved.

[2] The defendant had acted unreasonably and wrongfully in terminating the agreement. Further the defendant deliberately kept back the information from the plaintiffs.

[3] The oral evidence introduced in an attempt to vary the terms of the written agreement was inadmissible.

[Specific performance ordered. Defendant's counterclaim dismissed.]

Legislation referred to:
Evidence Act 1950, ss. 91, 92

For the plaintiffs - James Ponniah & Soo Lim Pang
For the defendant - Peter Mooney & Wong Weng Kwai

JUDGMENT

Ajaib Singh J:

The plaintiffs in this case sued the defendant for specific performance of an agreement entered into between them and alternatively a refund of the sum of RM300,000 which the plaintiffs had paid towards the purchase price. The plaintiffs also claimed a further sum of RM300,000 as liquidated damages and a sum of RM48,302 as special damages which the plaintiffs alleged they had incurred in levelling and filling the land and for demarcation fees, drainage, preliminary expenses and fees paid to the Survey Department, to the Collector of Land Revenue and to a private surveyor.

In the statement of claim the plaintiffs contended that the defendant had by an agreement in writing dated 22 September 1975 agreed to sell her land for the price of RM700,000 of which the plaintiffs paid RM150,000 as deposit and part payment of the purchase price. A further sum of RM150,000 was paid to the defendant on or about 15 November 1975 in accordance with the terms of the agreement and the balance of RM400,000 was to be paid "within one (1) month after the plaintiffs being informed by the defendant in writing that the subdivisional titles in respect of the subdivisional lots in respect of the said lands have been duly issued by the proper registering authority."

The plaintiffs alleged further that under the agreement the defendant was to take all steps and sign all documents necessary for the early issue of the subdivisional titles. The defendant however by letter dated 7 September 1976 unlawfully and wrongfully repudiated the agreement on the alleged ground that no drainage plans were submitted to the town council for approval. The plaintiffs further averred that the plans were in fact submitted by them to the town council on 9 July 1976 but they were returned with the request that the defendant should sign the same. These were forwarded to the defendant on 20 October 1976 but she refused to sign the plans and returned them to the plaintiffs unsigned. The plaintiffs averred further that they were still ready and willing to fulfil all the obligations under the agreement.

In the amended statement of defence the defendant admitted entering into the agreement with the plaintiffs and has not denied receiving a total sum of RM300,000 towards the purchase price but she contended that "the true intent and import of the said agreement and the antecedent dealings between the parties leading to the execution of the said agreement have not been fully and/or accurately set out in the statement of claim."

The defendant also contended that the plaintiffs were aware that the relevant authorities had approved a layout subdivisional plan of the land subject to compliance with three conditions as follows:

(1) that an approach road of not less than 20 feet should be constructed from Jalan Rasah, Seremban, to the said lands.

(2) that a proper layout plan showing the main roads, lanes and main drains should be submitted for approval by the relevant authorities.

(3) that the construction of the main roads, lanes and main drains should be in accordance with the approved plans.

The defendant contended that she having made known to the plaintiffs that she "was unable to carry out the three conditions stated in para. 4 hereof and the plaintiffs orally undertook to carry out the aforesaid three conditions, such undertaking being given prior to the execution of the said agreement."

The defendant contended that the plaintiffs orally undertook to arrange for proper layout plans of the roads, lanes and main drains to be prepared for her signature and submission to the relevant authorities and that it was upon this assurance that she entered into the sale agreement with the plaintiffs.

The defendant contended further that the plaintiffs failed and or neglected to comply with the three conditions despite repeated requests by her and hence she had lawfully repudiated the aforesaid agreement.

In the alternative she contended that "if, which is denied, the defendant was obliged to take all steps necessary for the early issue of subdivided titles to the said lands by Clause 11 of the aforesaid sale and purchase agreement, the defendant contends that the plaintiffs after repeated requests from the defendant, agreed to perform the obligations created by the aforesaid Clause 11 including fulfilling the conditions stated in para. 4 hereof." Thus she contended that she was discharged from performing any of the obligations created by clause 11 of the agreement except the signing of the plans and she contended that the plaintiffs are estopped from denying that they were obliged to take all necessary steps including fulfilling of the three conditions.

Clause 11 of the agreement is as follows:

> The Vendor shall take all steps and sign all documents necessary for the early issue of the subdivisional titles of the said lands according to the layout plan annexed hereto.

The defendant also counterclaimed contending that by the wilful neglect and or failure on the part of the plaintiffs she had suffered damage. She also claimed quit rent and assessment for 1976 and 1977 in the sum of RM9,941.10 (and continuing) and survey fees in the sum of RM5,000.

In their amended reply the plaintiffs contended that the true intent and import of the agreement had been fully and accurately set out in their statement of claim. They denied any knowledge of the three conditions and contended that they first came to know about these three conditions from the defendant's letter to them dated 21 April 1976. They contended that the defendant had never disclosed the three conditions nor did they orally or otherwise undertake to carry out the conditions. They contended further that the defendant misrepresented to them that the subdivisional titles would be issued and thereby induced the plaintiffs to purchase the land. The conditions were made known to them only in April 1976 whereupon the plaintiffs orally agreed to assist her in expediting the early issue of the subdivisional titles.

In their defence to the counterclaim the plaintiffs contended that the defendant was not entitled to any of her claims under the terms of the agreement.

The three plaintiffs gave evidence themselves and called a few witnesses. The defendant did not say much in her evidence and left it all to her husband who had conducted the whole transaction with the plaintiffs on her behalf.

The case lasted several days and the evidence both oral and documentary is fairly lengthy and I do not intend to deal with the evidence adduced at great length. The option which was given by the defendant and the subsequent formal agreement which the parties had signed contained categorical assertions by the defendant that she had already obtained approval for the subdivision of the land which she was selling to the plaintiffs. In the agreement itself it is stated that the defendant "has successfully applied for subdivision of the said lands according to the layout plan hereto attached and the separate documents of title in respect of the same are about to be issued by the proper registering authority."

These statements were patently false. The evidence disclosed that the authorities had already notified the defendant through her private surveyor that the defendant had to comply with the three conditions before approval could be given for subdivision. I accepted the evidence adduced on behalf of the plaintiffs that this fact was disclosed to the plaintiffs only on 21 April 1976 some 7 months after the signing of the agreement when the defendant's solicitors wrote to the plaintiffs (Bundle A p. 43). In reply the plaintiffs by letter dated 6 April 1976 said that the responsibility for fulfilling the conditions rested with the defendant under clause 11 of the agreement.

The evidence of the plaintiffs which I accepted was to the effect that had they known about these three conditions they would not have offered RM700,000 because they would have had to expend a large sum of money to comply with the three conditions. In his evidence the defendant's husband said that he found no need to spell out the three conditions in any of his earlier letters to the plaintiffs. He said he had informed the 2nd defendant about the three conditions and the 2nd defendant told him that there was no need to specify the conditions in the agreement because Clause 9 of the agreement covered those conditions. In his evidence the husband insisted very strongly that Clause 9 covered the three conditions. Clause 9 is in the following terms:

> (9) All expenses incurred for the development and improvement of the said lands, for the purchase of any adjoining state land, construction of roads, lanes, drains, culvert etc. and the issue of titles to the subdivisional lots of the said lands and the costs of survey with effect from the date hereof shall be borne and paid by the Purchasers, but the Purchasers shall pay to the Vendor on the date of completion of this sale all deposits paid by her to the private surveyor, Haji Maidin bin Abdul Manap hencetofore in respect of the subdivision of the said lands according to the layout plan hereto annexed.

I think I should say it here at once that I can find nothing in Clause 9 which relates to any of the three conditions. These three conditions were not minor ones. They involved a great deal of work and expenditure and it is utterly difficult to comprehend that such important matters would simply be left out of a formal agreement of purchase and sale involving a large and expensive piece of land.

As I said earlier I accepted the evidence adduced on behalf of the plaintiffs. The defendant appeared to have taken the three conditions lightly and as Mr. James Ponniah submitted she might well have formed the impression that the conditions would no longer be applicable. It seems to me very likely that the defendant deliberately kept back this information from the plaintiffs so as not to jeopardise her plan to sell the land at the price of RM700,000 to the plaintiffs and leaving the plaintiffs later on to face the problem themselves. Now the defendant was trying to bring in oral evidence in an attempt to vary the terms of the written agreement which in my view is fairly complete and exhaustive in its terms. In the circumstances therefore I was of the view that under ss. 91 and 92 of the Evidence Act such oral evidence was inadmissible.

As I said in giving my decision of 9 January 1982 there was no undue delay by the plaintiffs in trying to comply with the agreement. They were doing all they could reasonably do in the circumstances and I held that the defendant had acted unreasonably and wrongfully in terminating the agreement. The plaintiffs on their part had paid RM300,000 as part payment towards the purchase price and they were willing to pay the balance. As for getting the plans approved they were doing their best in the circumstances. In the event I found for the plaintiffs. I was of the view that this was a proper case to order specific performance of the

agreement and I ordered accordingly. I also held that the plaintiffs were entitled to their claim for damages arising out of the wrongful termination of the agreement. Their development project had been held back for several years and taking this into account I ordered RM50,000 as damages.

After I had announced my decision Mr. Soo Lim Pang for the plaintiffs asked if I would also allow the plaintiffs' claim for the sum of RM48,302. I said no because these were expenses which were to be borne by the plaintiffs themselves under clause 9 of the agreement. The plaintiffs would have been entitled to this sum but only if I had not ordered specific performance and had given judgment in the alternative claim for the refund of the sum of RM300,000.

The defendant's counterclaim was dismissed. Under Clause 10 of the agreement all quit rents and assessments incurred before the date of completion of the sale were required to be paid by the defendant. As for the claim for the survey fees the receipt for the sum of RM5,000 issued by a private surveyor to the defendant was not for fees but was for payment by way of deposit. Under Clause 9 of the agreement the plaintiffs were required to pay to the defendant on the date of completion of the sale all deposits paid by her to the private surveyor. The defendant is certainly entitled to this sum but will receive it only on the date of completion of the sale.

Also found at [1982] CLJ 363